Supreme Court, U.S.
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No. 99-312

In The Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. AS THE SIXTH CIRCUIT ACKNOWLEDGED, ITS HOLDING IS IN SQUARE CONFLICT WITH THE MAJORITY OF OTHER COURTS OF APPEALS	1
II. THIS CASE IS THE RIGHT VEHICLE FOR RESOLVING THE CONFLICT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
Armijo v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (10th Cir. 1996)	6, 7
Bock v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920 (8th Cir. 1999)	6, 7
CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993)	2, 3
Fillippon v. *Albion Vein Slate Co.*, 250 U.S. 76 (1919)	5
Hatfield v. *Burlington N. R.R. Co.*, 64 F.3d 559 (10th Cir. 1995)	7
St. Louis Southwestern Ry. Co. v. *Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994)	6
Thiele v. *Norfolk & W. Ry. Co.*, 68 F.3d 179 (7th Cir. 1995)	7
Union Pac. R.R. Co. v. *Sharp*, 952 S.W.2d 658 (Ark. 1997)	3
United States v. *River Rouge Improvement Co.*, 269 U.S. 411 (1926)	5
Yazoo & Miss. Valley R.R. Co. v. *Mullins*, 249 U.S. 531 (1919)	5
FEDERAL STATUTES, REGULATIONS AND RULE	
23 U.S.C. § 109(e)	2
§ 409	1
49 U.S.C. § 20106	7
23 C.F.R. § 630.106(a)	2
§ 646.214	2
Fed. R. Civ. P. 49	5
OTHER AUTHORITIES	
9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 1995)	5
Federal Railroad Administration, U.S. Dep't of Transportation, *Rail-Highway Crossing Safety Action Plan Support Proposals* 1 (June 13, 1994) <http://www.bts.gov./smart/cat/APSP.html>	4

REPLY BRIEF

In her brief in opposition, respondent does not dispute that there is a deep and mature 6-2 split among the courts of appeals and state supreme courts on the question whether claims of negligence based on inadequate warning devices at a railway grade crossing are pre-empted when the devices were installed with federal funds under a project approved by the federal government. See Pet. 13-16. Respondent also does not question the surpassing importance of this issue for railroads and plaintiffs alike, which the Sixth Circuit recognized. Pet. App. 17a-18a. Nor does respondent question the irrationality of litigating negligence when the critical evidence "compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of . . . railway-highway crossings" is barred from discovery or admission in a court proceeding by operation of law. 23 U.S.C. § 409 (footnote omitted); Pet. 16-19. Instead, respondent merely asserts in conclusory terms that this case does not present a perfect opportunity for this Court to resolve that conflict. Her arguments are flawed.

I. AS THE SIXTH CIRCUIT ACKNOWLEDGED, ITS HOLDING IS IN SQUARE CONFLICT WITH THE MAJORITY OF OTHER COURTS OF APPEALS.

Respondent argues that, on the facts of this case, the Sixth Circuit decision does not conflict with those of other circuits. Resp. Br. 6-7. The Sixth Circuit plainly believed otherwise, for it declared that its decision was in square conflict with the majority-rule courts that have held that inadequate-device tort claims are pre-empted whenever federal funds participate in the installation of warning devices under a project approved by the Federal Highway Administration ("FHWA"). Pet. App. 16a-17a.

Respondent's argument to the contrary is predicated on a basic misunderstanding of the FHWA regulation at

issue, 23 C.F.R. § 646.214. That regulation prescribes what will constitute "[a]dequate warning devices" where "Federal-aid funds participate in the installation of the devices." *Id.* § 646.214(b)(3)(i) (emphasis omitted). Subsection (b)(3) of the regulation provides that for enumerated high-risk crossings, only devices that include "automatic gates with flashing light signals" are adequate, unless the FHWA finds to the contrary based on diagnostic-team recommendations. *Id.* § 646.214(b)(3)(i), (ii). Subsection (b)(4) provides that, for all other crossings, the "type of warning device to be installed . . . is subject to the approval of FHWA." *Id.* § 646.214(b)(4). See *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 666-67 (1993).

Respondent misconceives this regulation to set forth elements of an affirmative pre-emption defense that must be proven at trial. According to respondent, Norfolk Southern cannot claim pre-emption under subsection (b)(4), because she purports to have submitted proof at trial that, at the time of the accident at issue in this case, Oakwood Church Road was a high-risk crossing governed by (b)(3). See Resp. Br. 5. Respondent asserts that this distinguishes the majority-rule decisions because those courts either "noted that no (b)(3) conditions existed at the crossing at issue or refused to consider the presence of (b)(3) conditions." *Id.* at 7.

This argument is a red herring; 23 C.F.R. § 646.214 has nothing to do with trial proof of crossing conditions. The regulation instead sets forth the standards that the *FHWA*, pursuant to its statutory and regulatory obligation to assure the adequacy of warning devices, see 23 U.S.C. § 109(e); 23 C.F.R. § 630.106(a), applies in determining whether to approve federal funds for a project in the first instance. As the Supreme Court of Arkansas held in rejecting a similar argument:

> We find that such an analysis begs the question presented by this case. . . . [W]hether the conditions listed in (b)(3) exist at a particular crossing is for the FHWA, not a jury, to decide. Once the FHWA has spoken on the issue by providing federal funds for a state improvement project, the determination of whether (b)(3) conditions exist has already been made, and it may not be revisited by the state courts.

Union Pac. R.R. Co. v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997).

In *Easterwood*, this Court was explicit that pre-emption occurs because the FHWA regulation displaces state and railroad decisionmaking. 507 U.S. at 670.

> [F]or projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The . . . regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Id. at 671. Pre-emption is a function of the regulatory scheme, not of trial proof. Even the Sixth Circuit, despite its errors, had no illusions as to the relevance of trial proof, and it ignored these very same arguments advanced by respondent.[1] Rather, the court of appeals adopted the

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[1] The district court did lapse into the same error as respondent, *see* Resp. Br. 5, but its analysis was discarded by the Sixth Circuit.

Although irrelevant to the issue at hand, petitioner disputes respondent's contention that Oakwood Church Road was in fact a high-risk crossing. Nothing in the passages from the opinions of the courts below cited by respondent suggests otherwise. *Cf. id.* at 5-6. Both the district court on summary judgment and the court of appeals in reviewing the verdict were "construing the evidence most strongly in favor of the [respondent] and discarding all counter-

Seventh Circuit's legal rule as to what FHWA conduct would trigger pre-emption, and acknowledged that the dispositive rule it announced conflicted with the majority rule. Pet. App. 16a-17a. The question on which the courts are divided is thus cleanly presented by this case.

II. THIS CASE IS THE RIGHT VEHICLE FOR RESOLVING THE CONFLICT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT.

Respondent also claims that this case is a poor vehicle for resolving the split among the circuits because the jury rendered a general verdict, and she had alleged multiple claims of negligent conduct. Resp. Br. 8-9. By this logic, no railroad would ever be entitled to seek certiorari on the question presented if a general verdict is rendered against it, because plaintiffs invariably allege as many possible bases of tort liability as they can.

General verdicts are the norm in our jury system, 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2501, at 151 (2d ed. 1995), and defendants have no duty to request special verdicts.[2] Moreover, it has always been the rule that "in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless." *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 83 (1919) (reversing for instructional error in negligence case); *Yazoo & Miss. Valley R.R. Co.* v. *Mullins*, 249 U.S. 531, 533 (1919) (same); *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926) (same in condemnation case). Here, contrary to *Easterwood*, the district court instructed the jury that petitioner's duty to exercise reasonable care in warning motorists of an oncoming train "may encompass providing additional warning devices if the crossing is more than ordinarily hazardous," C.A. App. 412, and in summation respondent's counsel emphasized the theory that petitioner was negligent in not installing active warning signals at the Oakwood Church Road crossing. If this Court were to grant certiorari and adhere to *Easterwood*, there is no doubt that a retrial would be required. Thus, respondent's assertion that "the result in this case cannot be changed by this Court's grant of further review," Resp. Br. 9, is wrong. Moreover, respondent would not be prejudiced; she would be entitled to try any remaining

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vailing evidence." Pet. App. 23a, 27a. Furthermore, the notion that plaintiff's putative experts can accurately determine the need for active warning signals is fanciful; these determinations are properly made by state highway agencies through sophisticated computer modeling of a multitude of highly interdependent risk factors, conducted annually to account for changes in crossing conditions, and using data compiled only by the State and unavailable to either side in this trial. *See* Pet. 8-10.

Finally, respondent misstates the record. She twice claims that "no diagnostic team examined the Oakwood Church Road Crossing to determine what warning devices were necessary." Resp. Br. 4, 5. There is no such evidence; pursuant to 23 U.S.C. § 409, the Tennessee Department of Transportation refused to disclose whether any diagnostic team evaluated that crossing. C.A. App. 314-15; Pet. 9 n.11. Respondent also avers that the railroad crossing was "unprotected," Resp. Br. 1, despite the fact that the crossing had the full array of passive warning devices. Pet. 8 & n.9. Nearly two-thirds of the nation's public grade crossings have only passive devices, Federal Railroad Administration, U.S. Dep't of Transportation, *Rail-Highway Crossing Safety Action Plan Support Proposals* 1 (June 13, 1994) <http://www.bts.gov./smart/cat/APSP.html>, and it can hardly be said that the federal and state governments regard those crossings as "unprotected."

[2] Indeed, respondent was free to request a special verdict or interrogatories on this issue if she had been confident in the strength of her other tort or statutory claims and wished to protect the judgment from appeal on the *Easterwood* issue. *See* Fed. R. Civ. P. 49. The decision whether to grant such a request would have been within the sound discretion of the district court. 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2505, at 161 (2d ed. 1995).

legally valid claims against petitioner before a properly instructed jury. This case thus presents an unblemished vehicle for resolving the conflict among the lower courts over the proper interpretation of *Easterwood*.

Finally, respondent suggests that this Court should deny certiorari here simply because a petition for certiorari might be filed in *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920 (8th Cir. 1999), which might raise the *Easterwood* pre-emption issue. In fact, this case is far superior to *Bock* as a vehicle for determining the primary issue under *Easterwood*: namely, whether FHWA approval of federal funds for a project to install warning devices at a grade crossing is the touchstone for pre-emption of inadequate-device tort claims under state law.[3]

Bock, however, turns not only on that basic issue but also on secondary, more complicated, and less developed questions: namely, whether pre-emption is affected by a State's decision to replace devices that had been installed with federal funds, 181 F.3d at 922-23, or by delay in installing devices after federal approval, *id.* at 923. There is no clean split in the circuit courts on these subsidiary issues,[4] both of which are necessary to full resolution of

[3] Like the Sixth Circuit, Pet. App. 14a-17a, respondent consistently derides the majority rule as resting upon "the legal fiction that federal funding is equivalent to a federal determination that the devices being funded provide adequate protection for motorists at a particular crossing." Resp. Br. 2. There is no fiction. Respondent and the court of appeals simply ignore the fact that approval of the adequacy of devices is a legal condition precedent to FHWA authorization of federal funds for a project, *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996), and that FHWA regulations provide a specific procedure for evaluating the devices in question in order to approve federal funding. *See* Pet. 7-8.

[4] There is some divergence in opinion in the circuits on the timing of pre-emption (*i.e.*, when federal funds may be said to "participate" in the project). *Compare St. Louis Southwestern Ry. Co.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864, 867 (8th Cir. 1994) *and Thiele* v. *Norfolk & W. Ry. Co.*, 68 F.3d 179, 181-82 (7th Cir. 1995) *with Hatfield* v. *Burlington N. R.R. Co.*, 64 F.3d 559, 560-61 (10th Cir. 1995) (disagreeing as to whether federal participation short of installation was sufficient to trigger preemption). However, those cases rest on "markedly different" facts from *Bock*, as the Eighth Circuit pointed out. *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923 (8th Cir. 1999). *Bock* thus does not present an opportunity to resolve that issue; indeed, despite its disagreement with the Eighth Circuit on the timing point, the Tenth Circuit agrees with the ruling in *Bock* that pre-emption is not affected by a decision to replace federally funded devices. *Armijo*, 87 F.3d at 1192.

Bock, and they are not yet ripe for this Court's review. The prudent and usual course would be for this Court to grant this petition and either hold the petition in *Bock* or otherwise deny it.

As respondent tacitly concedes by promoting review of *Bock*, the question presented by this petition is manifestly worthy of, and ripe for, this Court's review. The conflict among the circuits is deep and mature. Moreover, it is simply untenable and arbitrary for state tort law to be pre-empted in the 19 States of the majority-rule circuits, but not in the 7 States covered by the Sixth and Seventh Circuits. Besides affronting the equal dignity of the States, this disparity frustrates Congress's stated goal that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable," 49 U.S.C. § 20106. The question presented merits immediate resolution by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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